In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-371

REECE SHIRLEY and RON'S, INC.,
d/b/a BONNER SPRINGS IGA,
Petitioners,

vs.

RETAIL STORE EMPLOYEES UNION AND ITS LOCAL 782, R.C.I.A., AFL-CIO, THEIR MEMBERS AND REPRESENTATIVES, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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Petitioners, Reece Shirley and Ron's, Inc., d/b/a/ Bonner Springs IGA, respectfully pray that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of Kansas entered in this case on June 11, 1977.

OPINIONS BELOW

The opinion of the District Court of Wyandotte County, Kansas, and the journal entry of judgment are unreported and are reprinted as Appendix A hereto (pp. A1-A11). The opinion of the Supreme Court of Kansas is reported at 222 Kan. 373, ... P.2d ..... (1977), and is reprinted as Appendix B hereto (pp. A12-A26).

JURISDICTION

Jurisdiction to review by Writ of Certiorari the opinion and judgment of the Supreme Court of Kansas, issued June 11, 1977 (App. B, pp. A12-A26), is conferred by 28 U.S.C. §1257(3)

QUESTION PRESENTED

Whether state courts are preempted by the National Labor Relations Act, as amended, 29 U.S.C. §§151, *et seq.*, from framing and enforcing an injunction aimed narrowly at a trespass by union pickets upon their employer's private property while engaged in an economic strike.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§151, *et seq.*, and the Kansas Criminal Code, K.S.A. 21-3721, are reprinted as Appendix C hereto (pp. A27-A28).

STATEMENT OF THE CASE

Ron's, Inc., is engaged in the business of a retail grocer and operates a supermarket under the name of Bonner Springs IGA, which is housed in the southern half of a building in Bonner Springs, Kansas, leased from and owned by Reece Shirley. There are only two stores, Bonner Springs IGA and a variety store, housed in the building, which is bounded on the east, south and west by public streets and on the north by a high wall and other business building. The stores face east and because of the topography are exposed to the public only from the east and the south.

The only entrance for patrons to the grocery store is on the east side of the store, approximately in the middle. The distance from the front of the grocery store across the parking area to the public sidewalk on the east side is approximately 200 feet.

There are three entrances from the public streets to the parking area adjacent to the grocery store—one on the east side, one on the south, and a third one at the southwest corner of the tract near the loading docks for the grocery store. Aside from these entrances, the parking area is separated from the adjoining streets by curbing, the public sidewalk running parallel to the street on the east side, and a narrow strip of land on the south.

The Retail Store Employees Union, Local 782, R.C.I.A., AFL-CIO (hereafter referred to as "Union"), has been certified by the National Labor Relations Board as the exclusive bargaining representative of those employees of the grocery store who are employed primarily as grocery clerks. On April 26, 1975, the Union, its members and representatives, already engaged in an economic strike, commenced picketing Bonner Springs IGA. While there is a public sidewalk parallel to and approximately 200 feet from the front of the grocery store, the picketing has been carried out on the private walk immediately adjacent to the front of the store and its entrance.

At times the pickets walk abreast, causing congestion on the walk. On occasion, some of the pickets eat their lunches on the curb at the south end of the building by the loading dock and park their cars in front of the store in spaces reserved for customers. All of this causes annoyance and inconvenience to the patrons of the store.

The Union was notified by the landowner and Bonner Springs IGA by telegram to cease and desist from trespassing on their property, but the Union has refused. As a result, on May 16, 1975, the owner of Bonner Springs IGA and the owner of the premises filed their petition with the District Court of Wyandotte County, Kansas, seeking to enjoin the Union and its members from unlawfully trespassing on private property and from interfering with their business. Thereafter, defendants filed their answer to the petition, asserting that jurisdiction over this matter was vested exclusively in the National Labor Relations Board pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§151, *et seq.* During the trial on the merits, no evidence of any violence, threats or harassment of patrons was introduced. After a full hearing, the court determined that the case was controlled by the decision of this Court in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and denied injunctive relief, stating that:

> "[t]o compel the Union to conduct its picketing off the premises of the shopping center under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store." (App. A, p. A6).

An appeal was taken to the Kansas Supreme Court where the parties took the same positions as they had before the district court. Although recognizing that this Court has specifically reserved the question of a state's right to enjoin a trespass as it may be involved in a labor dispute (App. B, p. A23), and that the appellate courts of a number of other states, applying the rule of preemption, have reached different results (App. B., p. A24), the

Kansas Supreme Court affirmed the judgment of the District Court, concluding that:

> "a state court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business. Unless the evidence establishes that these elements are present, a state court should not take jurisdiction in actions seeking injunctive relief in cases of peaceful trespassory picketing. Such controversy should properly be left for determination by the NLRB which has been given the authority to resolve conflicts between Sec. 7 rights and private property rights." (App. B., pp. A25-A26).

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided an Important Federal Question Which Has Not Been Determined by This Court.

Neither the National Labor Relations Act, 29 U.S.C. §§151, *et seq.*, nor its legislative history provides for preemption in the field of labor relations. However, the National Labor Relations Board has primary responsibility to regulate labor-management disputes. *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490-91 (1953). While this Court has expressly reserved the question of a state court's right to enjoin a trespass by union pickets on private property [*Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 24-25

(1957)], in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court established the general rule that "[w]hen an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States, as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if danger of state interference with national policy is to be averted." (359 U.S. at 245).

To this general rule of preemption this Court in *Garmon* announced two notable exceptions, namely, "where the activity regulated what was a merely peripheral concern of the . . . Act," or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, . . . [it] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44.

In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20 (1957), this Court expressly reserved the question of whether a state court has jurisdiction to enjoin a trespass by union pickets on private property. Although certiorari was granted on the very same question as that presented here in *Taggart* v. *Weinacker's, Inc.*, 396 U.S. 813 (1969), it was later dismissed as improvidently granted. 397 U.S. 223 (1970). In *Taggart*, however, Chief Justice Burger in a concurring opinion, stated:

> "In my view any contention that the States are preempted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law . . . Nothing in [*Garmon*] . . . would warrant this court to declare state-law trespass remedies to be ineffective and thus to remit a person to his self-help resources if he desires redress for illegal trespassory picketing. *Garmon* left to the States

> the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interest 'deeply rooted in local feeling and responsibility.' (359 U.S. at 233-234, 79 S.Ct. at 779). Few concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens." 397 U.S. at 227-28.

Although the facts in *Taggart* are strikingly similar to this case, namely, when contract negotiations broke down the Union called a strike and began picketing the store owner's premises on the private walkways and in front of the entrances to the store building without any acts of violence or threats of violence, the Kansas Supreme Court concluded that the *Garmon* exceptions were not applicable to this case.

Perhaps this Court recognized the need for a further articulation of the *Garmon* doctrine when earlier this year a Writ of Certiorari was granted in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, No. 76-750, 97 S.Ct. 1172 (1977). The question presented in that case is the jurisdiction of state courts to apply the general law of trespass to instances of unauthorized entry upon property by *non-employee* union agents engaged in informational or recognitional picketing.[1] The *Sears* case, however, does not directly present the issue raised in this case—the jurisdiction of state courts to apply the general law of trespass to instances of unauthorized entry upon property by *employee* union members engaged in *economic picketing*.

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1. In its decision the California Supreme Court suggested that the union's publicizing Sears' undercutting of prevailing wage rates for the employment of carpenters was "arguably" protected activity under section 7 but also considered the union's picketing as an activity intended to force Sears to recognize the union in those circumstances as "arguably" prohibited by section 8 of the National Labor Relations Act. See 93 LRRM 2163-64.

Relying on *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), and *Labor Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956), the Kansas Supreme Court determined that trespassory economic picketing by employee union members was both arguably protected and arguably prohibited by the National Labor Relations Act, and, therefore, state court jurisdiction is preempted.[2] In doing so, the Kansas Supreme Court made no mention of the factors which this Court in *Hudgens* suggested may be relevant in applying *Babcock* and *Central Hardware* to the facts of that case. Like *Hudgens*, this case involves lawful economic strike activity rather than organizational activity carried on by employees rather than by non-employees, and the property interests infringed upon include those of the landowner, as well as those of the employer against whom the picketing was directed.

The instant case presents this Court with an excellent opportunity to enunciate the rights of union employees, employers and their landlords in a context of economic picketing activity. To turn down this opportunity would perpetuate the "no-law area" referred to by Chief Justice Burger in *Taggart, supra*, leaving the employer in the position of using self-help or provoking the Union to charge the employer with an unfair labor practice.[3] In addition, in view of the conflicting state court applications of the *Garmon* doctrine to union trespassory picketing activity, the rights of employers and unions will vary from state to state, as shown subsequently herein.

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2. See *People* v. *Bush*, 39 N.Y.2d 529, 92 LRRM 3268 (1968), wherein the court, in a criminal trespass case, read *Hudgens* to permit state courts to consider allegations of trespass on private property.

3. See the concurring opinion of Mr. Justice White in *Longshoremen* v. *Ariadne Shipping Co.*, 397 U.S. 195, 201-202 (1970).

II. A Substantial Conflict Concerning the Application of Federal Law Exists Among the States.

In its decision the Kansas Supreme Court recognized that, contrary to its conclusion, several appellate state courts have determined that they have jurisdiction to enjoin peaceful labor picketing where a trespass is present.[4] In fact, in *Taggart* v. *Weinacker's, Inc.*, 283 Ala. 171, 214 So.2d 913 (1968), a case nearly identical to this case, the Supreme Court of Alabama concluded that state courts were not preempted from enjoining a trespass by peaceful union pickets engaged in an economic strike against their employer. Contrary to the Kansas Supreme Court, the Supreme Court of Alabama also found that the activity enjoined was neither protected by section 7 nor prohibited by section 8 of the National Labor Relations Act. 214 So.2d at 923.[5]

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4. See, *e.g.*, *People* v. *Goduto*, 21 Ill.2d 605, 174 N.E.2d 385, *cert. den.*, 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961), wherein the Supreme Court of Illinois found that its state courts have jurisdiction to enforce its criminal trespass statute against union members picketing on private property; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wis.2d 499, 114 N.W.2d 876 (1962), wherein the Supreme Court of Wisconsin upheld an injunction prohibiting union members from picketing on the private property of a shopping center; *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W.2d 66 (1974), wherein the Supreme Court of Tennessee determined that its state courts had jurisdiction to enforce against union pickets a city ordinance proscribing entering or standing in front of a business for the purpose of enticing anyone therefrom; and *May Dept. Stores* v. *Teamsters Local 743*, 64 Ill.2d 153, 355 N.E.2d 7 (1976), wherein the Supreme Court of Illinois held that states were not preempted by the *Garmon* doctrine from jurisdiction of an action involving trespass of union members on private property to distribute literature.

5. *Cf. People* v. *Bush*, 39 N.Y.2d 529, 92 LRRM 3268 (1976), wherein the court, suggesting that the union should have applied to the National Labor Relations Board for a determination of whether its activity was protected, determined that state courts were not preempted from enforcing a criminal trespass statute against union members picketing in front of a retail grocery store located in a private shopping center.

However, like the Supreme Court in the present case, other state courts have determined their jurisdiction preempted where union trespassory activities were at issue.[6]

The uniform administration of national labor policy is clearly impaired by the conflicting state applications of federal law. While the *Sears* case, presently before this Court, should resolve the issue of the jurisdiction of state courts to enjoin the trespass of non-employee union agents engaged in informational or recognitional activities upon private property, review of this case by this Court is warranted to also resolve the important issue of the jurisdiction of state courts to enjoin the trespass of employee union members engaged in peaceful, economic picketing upon private property.

III. The Court Below Has Misapplied the Garmon Rule of Preemption and Misconstrued Its Exceptions.

Not only does the union picketing in the present case fall within the *Garmon* exceptions, but also such activity does not satisfy the *Garmon* rule. Peaceful trespassory picketing by employee union members engaged in an economic strike is neither prohibited nor protected by the

6. See, *e.g.*, *Freeman* v. *Retail Clerks Union*, 58 Wash.2d 426, 363 P.2d 803 (1961); *Broadmoor Plaza, Inc.* v. *Amalgamated Meat Cutters*, 21 Ohio Misc. 245, 257 N.E.2d 420 (1969); *Hennapin Broadcasting Associates* v. *ASTRA*, 84 LRRM 217 (No. 696356, Minn. Dist. Ct. 4th Dist., 1973); *United Maintenance Co.* v. *Steel Workers*, 86 LRRM 2364 (No. 13405, W.Va. S.Ct., 1974); *Hudgens* v. *Local 315, Retail, Wholesale and Department Store Union*, 231 Ga. 669, 203 S.E.2d 478 (1974), *cert. den.*, 96 S.Ct. 1435 (1976); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 17 Cal.3d 893, 132 Cal. Rptr. 443, 553 P.2d 603 (1976), *cert. granted*, 97 S.Ct. 1172, 51 L.Ed.2d 580 (1977); and *Wiggins & Co., Inc.* v. *Retail Clerks Union*, 93 LRRM 2782 [No. 57199, Tenn. Chancery Ct., Knox County (1967)].

National Labor Relations Act.[7] In his concurring opinion in *Taggart*, Chief Justice Burger recognized that "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U.S. at 227.

The present action by the landowner and the employer is narrowly aimed at enjoining the trespass on private property. Since the issues of the labor dispute between the parties would not be affected by moving the situs of the Union's protest from the private property to the public sidewalks, the issue of the Union's trespass is only a peripheral concern of the National Labor Relations Act. Moreover, the issue of the Union's trespass on private property is certainly a matter "deeply rooted in local feeling and responsibility." The Kansas Legislature has enacted laws to protect against trespass (see K.S.A. 21-3721; App. C, pp. A27-A28); and the authority of Kansas courts to issue a permanent injunction enjoining unlawful trespass on real estate has long been recognized.[8] Likewise, maintaining domestic peace is a matter deeply rooted in local concern. In the present controversy, although the picketing on the private walkway and in front of the entrance to the store has been without any acts of violence or threats of violence, it has been carried out in such a manner as to obstruct customers, at least temporarily, in entering and leaving the store. As observed by the Supreme Court of Alabama in *Taggart*:

> "It is true that the evidence does not show that a blow has been struck or any blood shed, and, by some stan-

7. See *Taggert* v. *Weinacker's, Inc.*, 214 So.2d at 923 (1968); and Cox, *Labor Law Preemption Revisited*, 85 Harv. L.Rev. 1337, 1362-63 (1972).

8. See *Webster* v. *Cooke*, 23 Kan. 637 (1880); *Mendenhall* v. *School District*, 76 Kan. 173, 90 Pac. 773 (1907); and *Tharp* v. *Sieverling*, 128 Kan. 235, 276 Pac. 821 (1929).

dards, the trespass or picketing may be described, perhaps correctly, as peaceful. The obstruction of a person's use of an entrance to a building by the presence of another person, however, can be accomplished only by using, or threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair." 214 So.2d at 921.

Similarly, in *People* v. *Goduto*, 21 Ill.2d 605, 174 N.E.2d 385, *cert. den.*, 369 U.S. 927 (1961), the Supreme Court of Illinois found that the state courts have jurisdiction to enforce criminal trespass statutes based upon their responsibility to maintain domestic peace. The fact that no violence occurred simply meant that the property owner refrained from resorting to self-help to remove the trespassers.

While "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises" [*Taggart* v. *Weinacker's, Inc.*, 397 U.S. at 227 (Burger, C. J., concurring)], the interpretation of the *Garmon* rule by the court below to deny the employer or the landowner access to the state courts is tantamount to an unconstitutional deprivation of property without due process of law. The court below suggests that so long as it can be argued that the trespassory union activity is protected under section 7, it is within the exclusive jurisdiction of the National Labor Relations Board to reconcile section 7 rights with private property rights, citing *Labor Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956). See App. B, p. A22. This interpretation fails to recognize that *Babcock* was limited to

union organizational activity. Nevertheless, the net effect of the decision of the Kansas Supreme Court is to require the property owners to suffer an infringement to their property rights or resort to the use of self-help in hopes for an adjudication of their rights through an unfair labor practice proceeding initiated by a charge by the Union or an employee alleging a violation of §8(a)(1) of the National Labor Relations Act. See App. C, p. A27. This undesirable effect also commands that the parties have access to the state courts for a peaceful resolution of their rights.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that the judgment of the Supreme Court of Kansas be reversed and that this case be remanded to that Court with instructions to assert jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY,
KANSAS

No. 58386B

REECE SHIRLEY and RON'S, INC.,
d/b/a BONNER SPRINGS IGA,
Plaintiffs,

vs.

RETAIL STORE EMPLOYEES UNION AND ITS LOCAL 782, R.C.I.A., AFL-CIO; BOB REEDS; JOHN DOE, whose real name being unknown to Plaintiffs; and all other members, employees, agents and representatives of Retail Store Employees Union and its Local 782, R.C.I.A., AFL-CIO, unincorporated Labor Unions, whose real names are unknown to plaintiffs and therefore cannot be given, as individuals and representatives of said Labor Unions, and any and all other persons belonging to or pretending to belong to and acting for or on behalf of said Labor Unions, whose names are known and those acting in active concert with them,

Defendants.

MEMORANDUM DECISION

(Filed June 12, 1975)

This case was tried to the court on June 3, 1975, and was taken under advisement.

The controversy involves picketing by the defendant Union of a grocery store located in the Bonner Springs Plaza, a privately owned shopping center in Bonner Springs, Kansas.

It was stipulated that the plaintiff Reece Shirley is the owner of the shopping center and that the building in which the store is located is leased to the plaintiff, Ron's Inc., d/b/a Bonner Springs I.G.A. store. It was further stipulated that the defendant Union has been certified by the National Labor Relations Board as the exclusive representative of the employees of the grocery store and that the Union employees are on strike. It was further stipulated that the Union has placed pickets in front of the grocery store, that the picketing is peaceful, and that the Union has been notified by plaintiffs by telegram to cease and desist from trespassing on plaintiff's property but has refused to stop its picketing.

The plaintiffs have brought this action to enjoin the defendants from picketing on plaintiff's property, and it is their contention that such picketing constitutes a trespass in violation of the statutes of Kansas, that it is materially interfering with the store's operations, and that the picketing can be as efficiently and effectively accomplished on the public side walk and areas outside the shopping center.

The shopping center is located at the intersection of Front Street and Oak Street. It is bounded on the east

side by Oak Street, on the south by Front Street, on the west side by Elm Street, and on the north side by a high wall and other business buildings. There are only two stores located in the shopping center, the plaintiff's grocery store and a Ben Franklin Store, both of which are housed in one long building backed along Elm Street along the west side of the tract. The stores face east and because of the topography, are exposed to the public only from Front Street and Oak Street. There are three entrances to the shopping center—one on the east side from Oak Street, one on the south side from Front Street, and a third one at the southwest corner of the tract from Elm Street near the loading docks. Aside from these entrances, the shopping center is separated from the adjoining streets by curbing and a narrow strip of land on the south side and a narrow public sidewalk running along Oak Street on the east.

Plaintiff's store occupies the south half of the building and has a loading dock on the south side of the store. There is a walk covered by a canopy extending along the front of the stores which was described as approximately six feet in width. Parking spaces are lined out for the store's patrons in front of the store, and there was testimony that some items for sale are displayed on the walk and that the bumpers of cars parked in front sometimes overhang the walk so that in certain areas the passageway is restricted at times to perhaps 4 1/2 feet in width.

Between the stores and the outside perimeters of the shopping center, the area has been paved with asphalt and numerous parking spaces lined out. These areas provide common parking facilities for both stores in the shopping center.

The only entrance for patrons of the grocery store is on the east side of the store approximately in the middle of the store. The distance from the front of the store

across the parking area to the sidewalk along Oak Street was estimated by the store manager to be about 200 feet. Oak Street is the principal thoroughfare in Bonner Springs and is rather heavily traveled. Parking is permitted along both sides of the sidewalk.

The picketing has been carried out on the walk in front of plaintiff's store, usually by two pickets wearing banner type jackets stating that the union was on strike against plaintiff's store. Sometimes, only one picket is involved. There was testimony that at times the pickets walked abreast causing congestion on the walk, that some of them eat their lunches on the curb at the south end of the building by the loading dock, that pickets park their cars in front of the store in the spaces reserved for patrons, that there was at least one incident of horseplay, and that it all causes annoyance and inconvenience to the patrons of the store.

The evidence was, however, that such incidents were sporadic, of short duration, and relatively infrequent. There was no evidence of any violence, threats or harassment of patrons. Admittedly, the pickets are not justified in congregating at the south end of the store to eat lunch, or in walking abreast along the sidewalk, or in any manner interfering with patrons or employees of the store. On the basis of the evidence before me, however, I do not believe there is any showing that the pickets have significantly interfered with the use to which the shopping center was being put by plaintiffs and the general public, or with the store's operation.

Counsel have filed briefs which rely primarily on N.L.R.B. vs Babcock & Wilcox Co., 351 U.S. 105; Amalgamated Food Employees Local 590 vs Logan Valley Plaza, Inc. 391 U.S. 308; Central Hardware Co. vs N.L.R.B., 407 U.S. 539; Lloyd Corporation, Ltd. vs Tanner, 407 U.S. 551;

and Central Hardware Co. vs N.L.R.B., 81 LRRM 2468, (8th. C.C.A.).

In my opinion, the case before me is controlled by the ruling in Logan Valley, Supra. The facts are strikingly similar. There, as in this case, a privately owned shopping center was involved. Only two stores operated in the shopping center, although it was apparently a larger area and more shops were planned. The shopping center, as in this case, was bounded by two rather heavily traveled streets, and the only entrance to the shopping area was by way of five entrance ways from these streets. The shopping area was otherwise separated from the streets by earthen berms 12 to 15 feet wide running alongside the streets. The picketing was being carried out on the parcel pickup area in front of the store by pickets carrying signs. The court in reversing an injunction of a State court requiring the picketing to be carried on outside the shopping center stated:

> "Petitioner's picketing was directed solely at one establishment within the shopping center. The berms surrounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads alongside which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall —or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic

moves constantly at rates of speed varying from moderate to high . . . Finally, the requirement that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only.

It is therefore clear that the restraints of picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis."

In my opinion, the same reasoning applies here. To compel the Union to conduct its picketing off the premises of the shopping center under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store.

Judgment will therefore, be entered in favor of defendants denying the injunction. Please present an approved journal entry for my signature.

/s/ Harry G. Miller
Judge of the District Court

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY,
KANSAS

No. 59386B

REECE SHIRLEY and RON'S, INC., d/b/a
BONNER SPRINGS IGA,
Plaintiffs,

vs.

RETAIL STORE EMPLOYEES UNION LOCAL 782,
R.C.I.A., AFL-CIO, et al.,
Defendants.

JOURNAL ENTRY OF JUDGMENT

(Filed July 7, 1975)

Now on this 3rd day of June, 1975, this matter came on for hearing on Plaintiffs' Petition and Application for Injunction and Temporary Restraining Order. The plaintiffs appeared by William G. Haynes, their attorney. Defendants appeared by their attorney, John J. Blake. The Court, after hearing evidence, arguments of counsel and considering the memorandum briefs submitted by counsel, took the matter under advisement.

And now on this 12th day of June, 1975, the Court after considering the pleadings, evidence submitted, arguments and briefs of counsel, finds:

1. This controversy involves picketing by the defendant union of a grocery store located in Bonner Springs Plaza, a privately owned shopping center in Bonner Springs, Kansas.

2. That plaintiff, Reece Shirley, is the owner of the shopping center and the building in which the store is lo-

cated and which is leased to the plaintiff, Ron's Inc., d/b/a Bonner Springs IGA store.

3. The defendant union has been certified by the National Labor Relations Board as the exclusive representative of the employees of the grocery store and that the union employees are on strike.

4. That the union has placed pickets in front of the grocery store; the picketing is peaceful.

5. The union has been notified by the plaintiffs by telegram to cease and desist from trespassing on plaintiff's property but has refused to stop its picketing.

6. The shopping center is located at the intersection of Front Street and Oak Street. It is bounded on the east side by Oak Street, on the south by Front Street, on the west side by Elm Street, and on the north side by a high wall and other business buildings.

7. There are only two stores located in the shopping center, the plaintiff's grocery store and a Ben Franklin Store, both of which are housed in one long building backed along Elm Street along the west side of the tract.

8. The stores face east and because of the topography, are exposed to the public only from Front Street and Oak Street.

9. There are three entrances to the shopping center, one on the east side from Oak Street, one on the south from Front Street, and a third one at the southwest corner of the tract from Elm Street near the loading docks. Aside from these entrances, the shopping center is separated from the adjoining streets by curbing and a narrow strip of land on the south side and a narrow public sidewalk running along Oak Street on the east.

10. Plaintiff's store occupies the south half of the building and has a loading dock on the south side of the store.

11. There is a walk covered by a canopy extending along the front of the stores which is six feet in width. Parking spaces are lined out for the stores' patrons in front of the store, and items which are for sale are displayed on the walk. Bumpers of cars parked in front sometimes overhang the walk so that in certain areas the passageway is restricted at times to approximately four and one-half feet.

12. Between the stores and the outside perimeters of the shopping center, the area is paved with asphalt and there are numerous parking spaces lined out. These areas provide common parking facilities for both stores in the shopping center.

13. The only entrance for patrons of the grocery store is on the east side of the store approximately in the middle of the store.

14. The distance from the front of the store across the parking area to the sidewalk along Oak Street is approximately 200 feet.

15. Oak Street is a principal thoroughfare in Bonner Springs and is rather heavily traveled. Parking is permitted along both sides of the sidewalk. Picketing engaged in by the defendant is on the walk in front of plaintiff's store, usually by two pickets wearing banner type jackets stating that the union was on strike against the plaintiff's store.

16. At times the pickets walk abreast causing congestion on the walk. On occasion some of the defendants eat their lunches on the curb at the south end of the build-

ing by the loading dock and pickets park their cars in front of the store in spaces reserved for patrons. Evidence established one incident of horseplay. All of this causes annoyance and inconvenience to the patrons of the store. These incidences were sporadic and of short duration and relatively infrequent.

17. There was no evidence of any violence, threats, or harassment of patrons.

18. There was no showing the pickets have significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation.

19. Picketing by the defendant on the property of the plaintiff is controlled by *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308. That case, as in this case, a privately owned shopping center is involved. The shopping center here, as in that case, was bounded by two rather heavily traveled streets and the only entrance to the shopping area was by way of five entranceways from these streets. The shopping area was otherwise separated from the streets by earth and berms twelve to fifteen feet wide running alongside the street. The picketing was being carried out on the parcel pick-up area in front of the store by pickets carrying signs.

20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store.

21. The Memorandum of Decision and Judgment dated June 12, 1975, and signed by Harry G. Miller, Jr.,

Judge, 29th Judicial District, Division No. 3, is attached hereto and made a part of this Journal Entry.

22. Judgment is hereby entered against the plaintiffs and in favor of defendants, denying the injunction.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the Petition for Injunction shall be and is hereby denied and refused.

IT IS SO ORDERED.

/s/ Harry G. Miller
Judge of the District Court,
Division No. 3

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 48,142

REECE SHIRLEY and RON'S INC.,
d/b/a BONNER SPRINGS IGA,
Appellants,

v.

RETAIL STORE EMPLOYEES UNION AND
ITS LOCAL 782, R.C.I.A., AFL-CIO, *ET AL.*,
Appellees.

SYLLABUS BY THE COURT

1. LABOR RELATIONS—*NLRA—Field of Labor and Management As It Affects Interstate Commerce Preempted—Jurisdiction Vested in NLRB.* The United States Congress, by enacting the National Labor Relations Act, as amended, has in great part preempted the field of controversies arising between labor and management which affect interstate commerce, and has vested exclusive jurisdiction to determine such disputes in the National Labor Relations Board.

2. SAME—*Unfair Labor Practices—State Courts Must Defer to the Exclusive Jurisdiction of NLRB.* Where it is arguable that an activity is subject to the provisions of Sec. 7 or Sec. 8 of the NLRA defining unfair labor practices, state courts must defer to the exclusive jurisdiction of the National Labor Relations Board.

3. SAME—*Enjoining Trespassory Picketing—Showing of Violence—Denying Reasonable Ingress and Egress—*

Jurisdiction Depends on Whether These Elements are Present. A state court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business. Unless these elements are present, a state court should not take jurisdiction in actions seeking injunctive relief in cases of peaceful trespassory picketing which are arguably subject to the provisions of Sections 7 and 8 of the NLRA.

Appeal from the Wyandotte district court, division No. 3; HARRY G. MILLER, JR., judge. Opinion filed June 11, 1977. Affirmed.

K. Gary Sebelius, of Eidson, Lewis, Porter and Haynes, of Topeka, argued the cause, and *William G. Haynes,* of the same firm, was with him on the brief for the appellants.

Robert L. Uhlig, of Blake, Uhlig and Funk, of Kansas City, argued the cause, and was on the brief for the appellees.

The opinion of the court was delivered by

PRAGER, J.:

This is an action brought by the owner of a retail grocery business and the owner of a shopping center for an injunction to enjoin the retail store employees union and its members from interfering with plaintiffs' business and from unlawfully trespassing on private property. The plaintiffs-appellants are Reece Shirley, owner of a shopping center located in Bonner Springs, Kansas, and Ron's Inc., d/b/a Bonner Springs I.G.A., which leases certain

property in the shopping center for its grocery store business. The defendants-appellees are the Retail Store Employees Union and its local #782, R.C.I.A., AFL-CIO, and its members and representatives.

The petition alleged in substance that the union and its members are engaged in acts of unlawful trespassing upon the plaintiffs' property and interfering with plaintiffs' business, causing irreparable loss and damages which will continue if not restrained or enjoined. The defendants filed an answer to the petition admitting the relationship of the parties but asserting that the district court lacked jurisdiction over the subject matter of this action since such jurisdiction is vested exclusively in the National Labor Relations Board (NLRB), through operation of the National Labor Relations Act (NLRA), as amended, 29 U.S.C.A. Secs. 141-187. The answer further alleged that the defendant union had been certified by the NLRB as the exclusive bargaining representative of the employees of the plaintiff Ron's Inc.; that Ron's Inc. and the union had failed to agree on a labor contract; that the union went on strike and placed pickets at the plaintiff's place of business; that there exists a labor dispute between plaintiff Ron's Inc. and defendant and such strike is protected under the National Labor Relations Act. Defendants further alleged that all picketing was lawful, peaceful, and informational activity protected by the NLRA and the United States Constitution. Following the filing of the answer, the district court promptly set the case for trial on the merits. The case was tried to the court and after a full hearing the court took the matter under advisement. Thereafter the trial court by memorandum decision entered judgment in favor of the defendants, denying injunctive relief. An appropriate journal entry of judgment was prepared and the plaintiffs thereupon appealed to this court.

The essential facts as found by the trial court are set forth in the trial court's journal entry of judgment in the following language:

"1. This controversy involves picketing by the defendant union of a grocery store located in Bonner Springs Plaza, a privately owned shopping center in Bonner Springs, Kansas.

"2. That plaintiff, Reece Shirley, is the owner of the shopping center and the building in which the store is located and which is leased to the plaintiff, Ron's Inc., d/b/a Bonner Springs IGA store.

"3. The defendant union has been certified by the National Labor Relations Board as the exclusive representative of the employees of the grocery store and that the union employees are on strike.

"4. That the union has placed pickets in front of the grocery store; the picketing is peaceful.

"5. The union has been notified by the plaintiffs by telegram to cease and desist from trespassing on plaintiff's property but has refused to stop its picketing.

"6. The shopping center is located at the intersection of Front Street and Oak Street. It is bounded on the east side by Oak Street, on the south by Front Street, on the west side by Elm Street, and on the north side by a high wall and other business buildings.

"7. There are only two stores located in the shopping center, the plaintiff's grocery store and a Ben Franklin Store, both of which are housed in one long building backed along Elm Street along the west side of the tract.

"8. The stores face east and because of the topography, are exposed to the public only from Front Street and Oak Street.

"9. There are three entrances to the shopping center, one on the east side from Oak Street, one on the south from Front Street, and a third one at the southwest corner of the tract from Elm Street near the loading docks. Aside from these entrances, the shopping center is separated from the adjoining streets by curbing and a narrow strip of land on the south side and a narrow public sidewalk running along Oak Street on the east.

"10. Plaintiff's store occupies the south half of the building and has a loading dock on the south side of the store.

"11. There is a walk covered by a canopy extending along the front of the stores which is six feet in width. Parking spaces are lined out for the stores' patrons in front of the store, and items which are for sale are displayed on the walk. Bumpers of cars parked in front sometimes overhang the walk so that in certain areas the passageway is restricted at times to approximately four and one-half feet.

"12. Between the stores and the outside perimeters of the shopping center, the area is paved with asphalt and there are numerous parking spaces lined out. These areas provide common parking facilities for both stores in the shopping center.

"13. The only entrance for patrons of the grocery store is on the east side of the store approximately in the middle of the store.

"14. The distance from the front of the store across the parking area to the sidewalk along Oak Street is approximately 200 feet.

"15. Oak Street is a principal thoroughfare in Bonner Springs and is rather heavily traveled. Parking is permitted along both sides of the sidewalk. Picketing engaged in by the defendant is on the walk in front of plaintiff's store, usually by two pickets wearing banner type jackets stating that the union was on strike against the plaintiff's store.

"16. At times the pickets walk abreast causing congestion on the walk. On occasion some of the defendants eat their lunches on the curb at the south end of the building by the loading dock and pickets park their cars in front of the store in spaces reserved for patrons. Evidence established one incident of horseplay. All of this causes annoyance and inconvenience to the patrons of the store. These incidences were sporadic and of short duration and relatively infrequent.

"17. There was no evidence of any violence, threats, or harassment of patrons.

"18. There was no showing the pickets have significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation.

"19. Picketing by the defendant on the property of the plaintiff is controlled by *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308. That case, as in this case, a privately owned shopping center is involved. The shopping center here, as in that case, was bounded by two rather heavily traveled streets and the only entrance to the shopping

area was by way of five entranceways from these streets. The shopping area was otherwise separated from the streets by earth and berms twelve to fifteen feet wide running alongside the street. The picketing was being carried out on the parcel pick-up area in front of the store by pickets carrying signs.

"20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store.

"21. . . .

"22. Judgment is hereby entered against the plaintiffs and in favor of defendants, denying the injunction."

At the trial the plaintiffs contended in substance that the defendant union's picketing constituted a trespass in violation of Kansas law (K.S.A. 21-3721); that such picketing materially obstructed and interfered with the store's operations; and that the picketing could be efficiently and effectively accomplished on the public sidewalk and other areas outside the shopping center. The defendant union maintained that the district court was without jurisdiction because jurisdiction was preempted by federal law and vested exclusively in the NLRB; that its picketing in the shopping center was protected by the First Amendment to the United States Constitution and the NLRA since it was peaceable and did not obstruct or interfere with plaintiff's business in any way. These same positions are taken by the parties on this appeal.

We must first consider the jurisdictional issue: Has the subject matter of this controversy been preempted by Congress and assigned to the exclusive jurisdiction of the NLRB so as to preclude state court jurisdiction? In the absence of the NLRA state courts would have jurisdiction to decide traditional trespass claims against unions and their members. However, a principal purpose of the Act is to establish a uniform national labor policy, and the Board has been given the initial responsibility for interpreting the Act and adjudicating claims of unfair labor practices. Although the Act does not explicitly preclude state courts from applying state law or federally declared standards to labor disputes, the United States Supreme Court has long recognized that state determinations might conflict with federal labor policy as established by the NLRA and interpreted by the NLRB, and the Supreme Court has required state courts to yield to the NLRB in this area. The leading case which supports the preemption doctrine is *San Diego Unions* v. *Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). In reviewing a California decision which awarded an employer damages from harm resulting from peaceful union picketing, Mr. Justice Frankfurter stated as follows:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .
>
> "At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administra-

tion of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . .

". . . When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (pp. 244-245.)

Sec. 7 of the NLRA (29 U.S.C.A. Sec. 157) provides employees with various rights vis-a-vis employers, including the right to organize, bargain collectively, and engage in other concerted activities for the purpose of collective bargaining or other activities. Picketing has been recognized as a legitimate tool which a union can use under this section to attempt to negotiate a collective bargaining agreement. Sec. 8 (29 U.S.C.A. Sec. 158) defines activities which constitute unfair labor practices, including certain types of picketing.

The preemption doctrine has long been recognized by the decisions of this court. (*Kaw Paving Co.* v. *International Union of Operating Engineers*, 178 Kan. 467, 290 P. 2d 110; *Texas Const. Co.* v. *H. & P.E. Local Union No. 101*, 178 Kan. 422, 286 P. 2d 160; *Friesen* v. *General Team & Truck Drivers Local Union No. 54*, 181 Kan. 769, 317 P. 2d 366; *Asphalt Paving* v. *Local Union*, 181 Kan. 775, 317 P. 2d 349; *Hyde Park Dairies* v. *Local Union No. 795*, 182 Kan. 440, 321 P. 2d 564; *Inland Industries, Inc.* v. *Teamsters & Chauffeurs Local Union*, 209 Kan. 349, 496 P. 2d 1327.) The Kansas legislature has also recognized the preemption doctrine. K.S.A. 60-904 (*c*) restricts the right to injunctive relief in labor disputes in the following language:

"60-904. . . .

"(*c*) *Restraint prohibited in certain cases. No restraining order or injunction shall prohibit any person or persons,* from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means to do so; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto, or *from any activity over which the federal authority is exercising exclusive jurisdiction.*" (Emphasis supplied.)

Obviously 60-904 (*c*) covers a wide range of activities in labor disputes which are placed beyond the jurisdiction of state court injunctions. It is thus quite clear that the Kansas legislature has established the public policy of this state to be that the Kansas courts should not grant injunctions in labor disputes where the activity is one reasonably subject to the jurisdiction of the NLRB.

The undisputed facts in the present case show that the defendant union has been certified by the NLRB as the exclusive bargaining representative of certain employees

of the Bonner Springs IGA. At the time the action was brought the union and its members were on strike because a labor contract could not be negotiated with the employer. The picketing here was the result of an existing labor dispute and was arguably subject to Sec. 7 or Sec. 8 of the NLRA.

We must consider, however, whether the picketing activities of the union in the present case were beyond the scope of the NLRA merely because they took place on the private property of the shopping center and, being without the owner's approval, were consequently of a trespassory nature. The Supreme Court of the United States has established that under certain circumstances union representatives have a right protected under Sec. 7 to enter the employer's premises. (*Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 100 L. Ed. 975, 76 S. Ct. 679 [1956]; *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 33 L. Ed. 2d 122, 92 S. Ct. 2238 [1972].) A determination of its scope requires an accommodation between Sec. 7 rights and private property rights with as little destruction of one as is consistent with the maintenance of the other. (*Labor Board* v. *Babcock & Wilcox Co.*, supra.) Under the *Garmon* rule so long as it can be argued that trespassory union activity is protected under Sec. 7, it is initially within the exclusive jurisdiction of the NLRB to reconcile these Sec. 7 rights with private property rights. It logically follows that state courts' jurisdiction in resolving this conflict should be denied. (Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1360-61 [1972]; Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552, 562-563 [1970].)

The Supreme Court has recently clarified this rule in *Hudgens* v. *NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976). *Hudgens* involved the picketing of an em-

ployer's retail store located in a privately owned shopping center. The owner of the shopping center threatened the pickets with arrest for trespassing. The union then filed a complaint of unfair labor practices against the owner of the shopping center under Sec. 7 of the NLRA. The Board, relying on *Food Employees* v. *Logan Plaza*, 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (1968), held that under the First Amendment guarantee of free expression, union members could not be enjoined from peaceful picketing of a retail store in a privately-owned shopping center which was the equivalent of a municipality's business district and entered a cease-and-desist order against the shopping center owner. Ultimately the case reached the United States Supreme Court which held that the striking employees had no First Amendment right to enter the shopping center to advertise their strike against their employer, but that the respective rights of the parties were to be decided under the criteria of the NLRA alone, by resolving conflicts between the employers' Sec. 7 rights and private property rights, and by seeking a proper accommodation between the two. In the opinion of the court written by Mr. Justice Stewart it was stated that *Logan Plaza* had been overruled by the intervening decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972), although other justices did not concur with this statement. In our judgment *Hudgens* is important to the resolution of the present case because it states clearly that in case of trespassory picketing the rights and liabilities of the picketing union and the property owner are dependent upon the provisions of the NLRA and that it is the task of the NLRB to resolve the conflict between competing Sec. 7 rights and private property rights and to seek a proper accommodation between the two.

From a consideration of these decisions we have concluded that the trespassory picketing activity at issue in

this case is both arguably protected by Sec. 7 and arguably prohibited by Sec. 8 of the NLRA and hence a case for federal preemption has been established. It is true that the Supreme Court in *Garmon* recognized exceptions to federal preemption by stating that state courts may take jurisdiction and act *where the activity involved is merely a peripheral concern of the federal labor relations statute,* or *where the regulated conduct touches interests so deeply rooted in local feeling and responsibility* that in the absence of compelling congressional direction it cannot be inferred that Congress deprived the states of the power to act. However, we have concluded that these exceptions are not applicable in the case before us.

In the present case the plaintiffs contend that the protection of private property from a trespass is an interest "so deeply rooted in local feeling and responsibility" that the state courts may enjoin peaceful labor picketing where trespass is present. The Supreme Court of the United States, despite several opportunities to grant certiorari, has not yet explicitly decided this question. The issue was specifically reserved in *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, 1 L. Ed. 2d 613, 77 S. Ct. 604 (1957). A number of state appellate courts when faced with the problem have reached different results depending to some extent on the factual circumstances presented in the individual cases: *People* v. *Goduto,* 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. denied,* 368 U.S. 927, 7 L. Ed. 2d 109, 82 S. Ct. 361; *May Dept. Stores* v. *Teamsters Local 743,* 64 Ill. 2d 153, 355 N. E. 2d 7; *Moreland Corp.* v. *Retail Store Employees Union,* 16 Wis. 2d 499, 114 N. W. 2d 876; *Hood* v. *Stafford,* 213 Tenn. 684, 378 S. W. 2d 766; *Taggart* v. *Weinacker's Inc.,* 283 Ala. 171, 214 So. 2d 913, *cert. granted,* 396 U.S. 813, 24 L. Ed. 2d 65, 90 S. Ct. 52, *cert. dismissed,* 397 U.S. 223, 25 L. Ed. 2d 240, 90 S. Ct. 876; *People* v. *Bush,* 39 N.Y. 2d 529, 384 N.Y.S. 2d 733, 349 N. E. 2d 832. Other cases have held that actions involving peaceful trespassory picketing are preempted by federal law and must be determined at least in the first instance by the NLRB. (*Freeman* v. *Retail Clerks Union,* 58 Wash. 2d 426, 363 P. 2d 803; *Broadmoor* v. *Amalgamated,* 21 Ohio Misc. 245, 257 N. E. 2d 420; *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters,* 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603, *cert. granted,* ..... U.S. ....., 51 L. Ed. 2d 580, 97 S. Ct. 1172; *Wiggins & Co., Inc.* v. *Retail Clerks Union, Local 1557,* 80 L. C. 908, Syl. 11 [Chancery Ct., Knox County, Tenn.].) In considering the various cases it is important to note that some of them involved situations where there was a threat of immediate violence or some actual obstruction to ingress and egress to and from the employer's place of business.

In *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131, 2 L. Ed. 2d 151, 78 S. Ct. 206 (1957), the Supreme Court held that a state court may lawfully enjoin a union from threatening or provoking violence and from obstructing or attempting to obstruct the free use of streets adjacent to the employer's place of business, and the free ingress and egress to and from that property. However, it held that a state court cannot lawfully enjoin a union from "all picketing or patrolling" of those premises. We believe that the answer to our problem may be found in *Youngdahl* when considered together with the other decisions of the Supreme Court which are discussed above. We have concluded that a state court has the power to enjoin trespassory picketing only where there is shown to be actual violence or a threat of immediate violence or some obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business. Unless the evidence establishes that these elements are present, a state court should not take jurisdiction in actions seeking injunctive relief in cases of

peaceful trespassory picketing. Such controveries should properly be left for determination by the NLRB which has been given the authority to resolve conflicts between Sec. 7 rights and private property rights. (*Hudgens* v. *NLRB*, supra.)

In the case now before us the allegations of the plaintiffs' petition reasonably implied that the trespassory picketing on the property of the shopping center was disrupting plaintiffs' business and denying them the free use of their property. In view of these allegations in the petition and the denial thereof in the defendants' answer, the district court properly set the case for hearing to determine whether or not there was any threat of immediate violence or some significant obstruction of ingress and egress to and from the plaintiff's grocery store. The trial court resolved these issues in favor of the defendant union finding that all picketing was peaceful; that there was no evidence of any violence, threats, or harassment of patrons; and that there was no showing that the pickets had significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation. We find there is substantial competent evidence in the record to support the trial court's findings. Having made this determination, the district court properly denied injunctive relief. Thereafter any controversy between the parties over the rights of the union under Sec. 7 and the property rights of the plaintiffs was a matter to be determined by the NLRB pursuant to the National Labor Relations Act.

The judgment of the district court is affirmed.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. (the "Act") and the Kansas Criminal Code (1970) are set forth below:

NATIONAL LABOR RELATIONS ACT

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

KANSAS CRIMINAL CODE

21-3721. Criminal trespass. Criminal trespass is entering or remaining upon or in any land, structure, vehicle, aircraft or watercraft by one who knows he is not authorized or privileged to do so, and,

(a) He enters or remains therein in defiance of an order not to enter or to leave such premises or property personally communicated to him by the owner thereof or other authorized person; or

(b) Such premises or property are posted in a manner reasonably likely to come to the attention of intruders, or are fenced or otherwise enclosed.

Criminal trespass is a class C misdemeanor.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-371

REECE SHIRLEY and RON'S, INC., d/b/a
BONNER SPRINGS IGA,
Petitioners,

vs.

RETAIL STORE EMPLOYEES UNION AND ITS LOCAL 782,
R.C.I.A., AFL-CIO, THEIR MEMBERS AND
REPRESENTATIVES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Kansas

BRIEF FOR RETAIL STORE EMPLOYEES UNION AND ITS LOCAL 782, R.C.I.A., AFL-CIO, THEIR MEMBERS AND REPRESENTATIVES, ET AL., IN OPPOSITION

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IN THE

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OPINIONS BELOW

The opinion of the District Court of Wyandotte County, Kansas, and Journal Entry of Judgment are unreported (Pet.

App. pp. AI-AII). The opinion of the Supreme Court of Kansas is reported at 222 Kan. 373, 565 P.2d 585 (June 11, 1977), and is reprinted in Pet. App. pp. A-12-A-26.

JURISDICTION

The decision of the Kansas Supreme Court was issued on June 11, 1977. The petition for a writ of certiorari was filed on September 8, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether state courts are pre-empted by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, from enjoining peaceful primary picketing.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, are reprinted in Pet. App. pp. A-27. The Kansas Criminal Code, K.S.A. 21-3721, is reprinted in Pet. App. pp. A-27-28. K.S.A. 60-904(c), which restricts the right to injunctive relief is set forth as Appendix A of Respondent's brief on Page A-1.

STATEMENT OF THE CASE

A. The Trial Court's Findings of Fact.

The essential facts as found by the trial court and relied upon by the Kansas Supreme Court are set forth in the trial court's Journal Entry of Judgment as follows:

1. This controversy involves picketing by the defendant union of a grocery store located in Bonner Springs Plaza, a privately owned shopping center in Bonner Springs, Kansas.

2. That plaintiff, Reece Shirley, is the owner of the shopping center and the building in which the store is located and which is leased to the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA store.

3. The defendant union has been certified by the National Labor Relations Board as the exclusive representative of the employees of the grocery store and that the union employees are on strike.

4. That the union has placed pickets in front of the grocery store; the picketing is peaceful.

5. The union has been notified by the plaintiffs by telegram to cease and desist from trespassing on plaintiff's property but has refused to stop its picketing.

6. The shopping center is located at the intersection of Front Street and Oak Street. It is bounded on the east side by Oak Street, on the south by Front Street, on the west side by Elm Street, and on the north side by a high wall and other business buildings.

7. There are only two stores located in the shopping center, the plaintiff's grocery and a Ben Franklin store, both of which are housed in one long building backed along Elm Street along the west side of the tract.

8. The stores face east and because of topography, are exposed to the public only from Front Street and Oak Street.

9. There are three entrances to the shopping center, one on the east side from Oak Street, one on the south from Front Street, and a third one at the southwest corner of the tract from Elm Street near the loading docks. Aside from these entrances,

the shopping center is separated from the adjoining streets by curbing and a narrow strip of land on the south side and a narrow public sidewalk running along Oak Street on the east.

10. Plaintiff's store occupies the south half of the building and has a loading dock on the south side of the store.

11. There is a walk covered by a canopy extending along the front of the stores which is six feet in width. Parking spaces are lined out for the stores' patrons in front of the store, and items which are for sale are displayed on the walk. Bumpers of cars parked in front sometimes overhang the walk so that in certain areas the passageway is restricted at times to approximately four and one-half feet.

12. Between the stores and the outside perimeters of the shopping center, the area is paved with asphalt and there are numerous parking spaces lined out. These areas provide common parking facilities for both stores in the shopping center.

13. The only entrance for patrons of the grocery store is on the east side of the store approximately in the middle of the store.

14. The distance from the front of the store across the parking area to the sidewalk along Oak Street is approximately 200 feet.

15. Oak Street is a principal thoroughfare in Bonner Springs and is rather heavily traveled. Parking is permitted along both sides of the sidewalk. Picketing engaged in by the defendant is on the walk in front of plaintiff's store, usually by two pickets wearing banner type jackets stating that the union was on strike against the plaintiff's store.

16. At times the pickets walk abreast causing congestion on the walk. On occasion some of the defendants eat their lunches on the curb at the south end of the building by the loading dock and pickets park their cars in front of the store in spaces reserved

for patrons. Evidence established one incident of horseplay. All of this causes annoyance and inconvenience to the patrons of the store. These incidents were sporadic and of short duration and relatively infrequent.

17. There was no evidence of any violence, threats, or harassment of patrons.

18. There was no showing the pickets have significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation.

19. Picketing by the defendant on the property of the plaintiff is controlled by *Amalgamated Food Employees Local* 590 *v. Logan Valley Plaza, Inc.*, 391 U.S. 308. That case, as in this case, a privately owned shopping center is involved. The shopping center here, as in that case, was bounded by two rather heavily traveled streets and the only entrance to the shopping area was by way of five entrance ways from these streets. The shopping area was otherwise separated from the streets by earth and berms twelve to fifteen feet wide running alongside the street. The picketing was being carried out on the parcel pick-up area in front of the store by pickets carrying signs.

20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store.

21. . . .

22. Judgment is hereby entered against the plaintiffs and in favor of the defendants, denying the injunction.

B. **The Kansas Supreme Court's Decision.**

The Kansas Supreme Court concluded ". . . a state court has the power to enjoin trespassory picketing only where there is shown to be *actual violence or a threat of immediate violence or some obstruction to the free use of the property* by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business." The Court noted in the present case the trial court, after hearing the evidence found that all picketing was peaceful; there was no evidence of any violence, threats, or harassment of patrons; and there was no showing that the pickets had significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation. They held the trial court properly denied injunctive relief. (Emphasis added.)

REASONS FOR DENYING THE WRIT

1. **The Subject Matter of This Controversy Has Been Preempted by the Congress of the United States and Assigned to the Exclusive Jurisdiction of the National Labor Relations Board Pursuant to the National Labor Relations Act, 29 U.S.C. § 141-187.**

We respectfully submit that this case is controlled by the recent Supreme Court case of *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). That decision held that the rights of employees to peacefully picket during an economic strike is not guaranteed by the Constitution, but depends entirely upon the National Labor Relations Act. The Court then went on to state the National Labor Relations Board is the proper party to resolve these matters. The Court stated at 96 S.Ct. 1029, 1037:

> "From what has been said it follows that the rights and liabilities of the parties are *dependent exclusively upon* the National Labor Relations Act. Under the Act the task of the Board, subject to review by the Courts, is to resolve conflicts between Section 7 rights and private property rights and to seek a proper accommodation between the two." *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 543. (Emphasis added.)

Thus, we submit, the Supreme Court has clearly indicated the National Labor Relations Board, not the Courts, are to resolve these matters. This is in keeping with the Congressional intent of having a uniform labor policy throughout the United States by enacting the National Labor Relations Act. To hold otherwise would mean each state, county and city court in cases of this kind would have to function as a mini-National Labor Relations Board. Surely, a result not intended by the Congress of the United States. The National Labor Relations Board was,

and is, the centralized agency with the expert knowledge set up by Congress to create a uniform federal labor policy. Otherwise, picketing may be legal in one state, and illegal in another. Congress desired to avoid those diversities and conflicts that would result from local procedures and attitudes in labor controversies. *Garner v. Teamsters Union*, 346 U.S. 485 (1953). The Supreme Court clearly recognized this in *Hudgens, supra*, when it stated at 96 S.Ct. 1038:

> "The locus of that accommodation, however, may fall at differing points along the spectrum depending upon the nature and strength of the respective §7 rights and private party rights in any given context. *In each generic situation the primary responsibility for making this accommodation must rest with the Board in the first instance.*" (Emphasis added.)

The Court went on to emphasize that the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.

The Court, in *Hudgens, supra*, then remanded the case to the National Labor Relations Board to consider the matter solely under the statutory criteria of the National Labor Relations Act. The Board re-affirmed its holding that the owner of a mall violated the Act by threatening to cause the arrest of employees of a store warehouse who were picketing a retail store located within the owner's enclosed shopping mall. The Board's decision, *Scott Hudgens and Local 315, Department Store Union R.W.D.S.U., AFL-CIO*, is reported at 230 N.L. R.B. No 73, 95 L.R.R.M. 1351 (June 23, 1977). The Board stated that to hold the picketing was not protected by Section 7 of the Act would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls and would thereby render Section 7 meaningless as to their employees.

We submit, that if state courts can interfere with peaceful primary picketing, the rights of employees to effectively strike will be destroyed. The employers will obtain restraining orders in cases of this type, and will use the courts to destroy the strike. The petitioner contends on page 11 of their brief that the injunction sought is narrowly aimed at enjoining the picketing on private property. The petitioner states the "issues of the labor dispute between the parties would not be effected by moving the sites of the union's protest from the private property to the public sidewalks . . ." Not so! Such removal by a state court may well cause a union to violate 29 U.S.C. § 158 (b)(4) by involving other neutral employers in the dispute. In this very case the lower court found (paragraph 7 Journal Entry of Judgment) "There are only two stores located in the shopping center, the plaintiff's store and a Ben Franklin store, . . .". To remove the pickets to the outer limits of the shopping center will cause the Ben Franklin store, a neutral employer, to become involved in the dispute. Such removal may well cause the Union's picketing to be in violation of 29 U.S.C. § 158(b)(4), which states:

> "(b) It shall be an unfair labor practice for a labor organization or its agents
>
> . . .
>
> (4)(b) forcing or requiring any person to cease using, selling, handling . . . or to cease doing business with any other person . . ."

If the Union is forced to the outer limits of shopping centers, it is possible every business in the shopping center will be involved in the dispute. The Court's order would force the Union to violate Section 8(b)(4) of the Act.

The employer here seeks an interpretation of the *Hudgens* decision that would give employers a license to bust strikes and unions. Such a decision will only encourage increased litiga-

tion, and cause employees who are denied the right to an effective strike to seek self help and risk jail or violence in order to obtain a labor contract with their employer. As the lower court found in its decision, Journal Entry of Judgment, paragraph 20:

> "20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store."

The Washington Superior Court, Benton County, in *Kadlec Hosp. v. Operating Engineers Local 280* reported at 91 L.R.R.M. 2703, March 11, 1976, refused an injunction in a state court suit for trespass. The Court, after reviewing the recent United States Supreme Court case on *Hudgens v. N.L.R.B., supra,* concluded:

> "A resumé of this decision is in order. We are to determine whether the defendant members, in the capacity of peaceful pickets are trespassing on plaintiff's property. The Supreme Court states they have no constitutional right to be there. The Court further states that if they have any legal right there, it is by virtue of the Taft-Hartley law, a Federal Statute and specifically § 7 of such act which goes to the very heart of labor organizations' existence. The initial interpretation of the acts of the parties with respect to the NLRA rests with the NLRB. Congress has so decreed. The Federal Courts have so ruled. The recent U.S. Supreme Court case has so ruled. In this situation this Court is prohibited from ruling on whether the pickets are trespassers. The proper forum is the NLRB. Therefore, this Court has no alternative but to dismiss the case."

We submit the above is a correct interpretation of the recent Supreme Court decision. The Courts have consistently held

that state statutes and jurisdiction must yield or "give way" where the conduct is even "arguably" subject to the National Labor Relations Act. See *Seapak, Division of W. R. Grace Corporation v. Industrial Technical and Professional Employees, etc.*, 300 F. Supp. 1197, 72 L.R.R.M. 2405 (1969); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Also, as was noted in the dissent in the *Hudgens* case, 92 S. Ct. at 1043, one of the issues was whether the employees could have picketed the public right-of-ways, where vehicles entered the shopping center. The dissent noted that apart from considerations of safety, that alternative was clearly inadequate. Prospective customers would have to read the sign while driving by in their vehicles—a difficult task indeed. Moreover, picketing at an entrance used by customers of all retail establishments may well invite undesirable secondary effects.

Finally, if the state is permitted to act, and grants an injunction and the injunction is later held to deny employees the right to picket under § 7 of the Act, then the employer will have used a state court to aid him in his strike. By the time the case is on appeal, the strike will long be over, as in this present case. Such a result should be rejected in the absence of a finding of violence or danger to public health or safety. *Sears Roebuck and Company v. San Diego County District Council of Carpenters*, 553 P.2d 603 (1976), Cert. granted 97 S.Ct. 1172.

It is admitted the state may protect against violence and protect the public welfare. The shopping center owner's right here is a "private" right of the property owner. In the present case, both the trial court and the Kansas Supreme Court found there was no violence, threat of violence or obstruction to the free use of the property involved. There is no substantial issue of public health or safety as would permit state action. Use of the state's trespass law to prevent peaceful primary picketing, which is regulated by the National Labor Relations Board would result in frustration of the uniform application of our federal labor laws.

2. **The Cases Cited by Petitioner Are Distinguishable.**

As the Supreme Court of Kansas in this case noted, in those cases where an injunction was granted, some of the cases involved situations where there was a threat of immediate violence or some actual obstruction to ingress and egress to and from the employer's place of business.

In *Taggart v. Weinacker's Inc.*, 214 So.2d 913 (1968), it was held that customers of the store were obstructed from entering or leaving the store. In the instant case, the Court specifically found the picketing was peaceful. Also, *Taggart, supra,* was decided before the recent Supreme Court case of *Hudgens, supra.*

In *People v. Goduto,* 174 N.E.2d 385 (1961), the defendants were non-employee union organizers. Here the pickets were employees of the store being picketed. The Court in *Goduto* held the defendants were guilty because they failed to have the Board determine the matter. The Court in *Goduto* did recognize (at page 386) that ". . . when an activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act the state must sustain from regulation." Again, *Goduto* was decided long before the recent Supreme Court case of *Hudgens, supra.*

The case of *May Department Stores v. Teamsters Local No. 743,* 355 N.E.2d 7 (1976), involved union organizers' solicitation of employees and distribution of literature on a company owned parking lot. In addition, the union's activity was in violation of a company non-solicitation rule in force at the store. The Union filed unfair labor practices with the National Labor Relations Board which were dismissed. It should be noted that the injunction in the May Department Store case was only aimed at organizational activity on company property. It was not aimed at peaceful primary picketing during an economic strike

by employees of the store involved. It cannot now be seriously contended the right to strike is not protected by 29 U.S.C. § 157. See *N.L.R.B. v. Tonkawa Refining Company,* 452 F.2d 900, 902 (C.A. 10, 1971); *N.L.R.B. v. Okla-Inn,* 488 F.2d 498, 502 (C.A. 10, 1974); and *Hudgens v. National Labor Relations Board, supra.*

CONCLUSION

For all of the above reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

K.S.A. 60-904(c) *Restraint prohibited in certain cases.* No restraining order or injunction shall prohibit any person or persons, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means to do so; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto, or from any activity over which the federal authority is exercising exclusive jurisdiction. (L. 1963, ch. 303, 60-904; Jan. 1, 1964.)